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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
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Washington, DC 20529-2090



U.S. Citizenship  
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DATE: JUL 12 2011

Office: CALIFORNIA SERVICE CENTER

FILE: 

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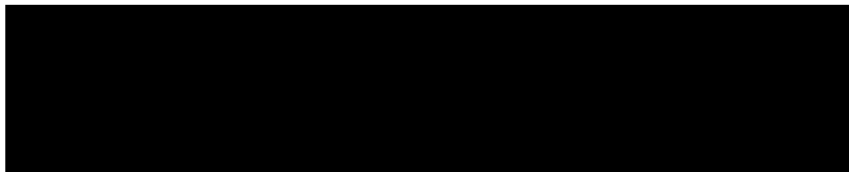
Petitioner:

Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will sustain the appeal.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as a nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a California corporation, is engaged in custom computer programming and web design services. It states that it is a wholly-owned subsidiary of Repolust & Repolust OEG located in Vienna, Austria. The petition seeks to employ the beneficiary in the position of Chief Technology Officer (CTO) for a period of two years.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel asserts that the director erred in placing undue emphasis on the size of the petitioning company in determining that the beneficiary would not be employed in a qualifying managerial or executive capacity. Counsel contends that a careful review of the beneficiary's stated duties considered in context of the nature and scope of the organization will establish that the majority of the beneficiary's duties are consistent with executive capacity, and demonstrate that the beneficiary directs an essential function of the company.

## **I. The Law**

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

## **II. The Issue on Appeal**

The sole issue addressed by the director is whether the petitioner established that the beneficiary would be employed in the United States in a primarily executive capacity. The petitioner does not claim that the beneficiary will be employed in the United States in a managerial capacity.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on December 11, 2008. In a letter submitted in support of the petition, the petitioner explained that its California office was established in 2000 to provide account management and consulting services for the company's existing U.S. clients who rely on its custom-tailored solutions in the areas of application development, web architecture and internet services. The petitioner indicated that it is temporarily relocating the beneficiary, the Chief Technology Officer of the petitioner's parent company, to the United States office to expand the scope of the U.S. operations and ensure that the company can successfully broaden its direct service offerings.

The petitioner explained the beneficiary's role as CTO and the need for his transfer as follows:

As CTO representing [the foreign entity], [the beneficiary] exercises executive-level control in developing, directing, and implementing all aspects of our activities such as online application development and internet service operations. He uses his proprietary expertise and experience to establish high quality standards within [the company]. [The beneficiary] networks extensively with our industry contacts and clients to continuously advance the operational effectiveness and competitive advantage of our company.

[The beneficiary] is responsible for staff development in the E.U. and the U.S. in an atmosphere that is dependent on building and maintaining a work force made up of some of the most qualified applicants. He has authority to recruit, develop, train, fire and promote our personnel. His primary duties in this area are to ensure that client engagements and new technology development activities are carried out to the standards of [the company].

In an industry where change and evolution is a given, having the right leaders is critical. [The beneficiary] oversees all projects to ensure the success of crucial client engagements. He implements milestones, policies and strategic business decisions, including the development of information technology standards. [The beneficiary] collaborates with the founder of [the company] in both the E.U. and the U.S. in order to fulfill the development and production responsibilities of our company to our clients. [The beneficiary] exercises control over the operational budget and has discretionary responsibility for determining and managing budgets for client engagements, trade shows and marketing campaigns. He reports directly to the founder . . . and the Chief Executive Officer. . . .

The petitioner indicated that the project management processes established by the beneficiary have enabled the company to provide services to prominent clients such as 20<sup>th</sup> Century Fox, Disney, Warner Bros., and Universal Pictures. The petitioner also stated that the beneficiary "transformed and optimized the communication processes that manage our client relationships between our offices in the European Union and the United States." The petitioner further noted that the beneficiary has established management methods that allow the U.S. company to acquire projects above the \$150,000 budget range, was instrumental in certifying the company as a Silver Solution Partner of Adobe Systems, Inc., and implementing a new range of mobile applications that resulted in the company's certification as a developer for Apple, Inc.

The petitioner stated that the beneficiary's immediate objective in the United States would be to build and train a team of local software engineers needed to fulfill the company's increasing demand for immediate technical response to client requests, and to assist the U.S. subsidiary in achieving greater independence from its parent company.

The petitioner submitted a group organizational chart for the U.S. and foreign entities which lists the beneficiary among the executive management team, comprised of the company president, chief executive officer, the beneficiary's position of CTO, the chief financial officer, and the director of creative and design. The chart reflects that the U.S. subsidiary's staff is comprised of an office manager, an account manager for the Americas, and two software engineers. The parent company is comprised of an office manager, an account manager, two project managers, a creative and design department with six employees, and a software application development department with 14 employees.

The director issued a request for additional evidence ("RFE") on March 18, 2009. The director instructed the petitioner to submit, *inter alia*, additional evidence to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity, including a more detailed description of the

beneficiary's duties, a list of all U.S. employees by name and job title, and evidence of wages paid to employees.

In a response dated April 21, 2009, the petitioner emphasized that the beneficiary works with the company's president and its chief executive officer "in both the planning and the execution of company strategy to maximize organizational performance." The petitioner indicated that the beneficiary's duties require him to establish work goals, objectives, and qualitative and quantitative standards to be achieved by all subordinates in the Creative, Design, Project Management and Software Application Development departments. The petitioner indicated that the beneficiary's job duties would be divided into three separate areas of responsibility. Briefly, the petitioner indicated that the beneficiary would devote 50 percent of his time to operations management tasks, which include contributing to the company's strategic direction from a technology viewpoint, and establishing technical and communication standards for project development across the company's international operations. The petitioner indicated that, in the United States, the beneficiary would be transferring, implementing, and supervising the operational management techniques and processes he implemented abroad to ensure the success of the U.S. company's expansion efforts.

The petitioner indicated that the beneficiary would devote 20 percent of his time to corporate development along with the other members of the company's senior management team, a responsibility that includes communicating technology strategy and analyzing the workload and personnel needs of all company departments. The petitioner explained that an additional 20 percent of the beneficiary's time would be devoted to strategic partnership development. The petitioner provided several examples of joint venture and partnership product and service opportunities recently obtained by the beneficiary.

Finally, the petitioner indicated that the remainder of the beneficiary's time would be allocated to establishing a scalable corporate infrastructure and information security plan that would be applied to the U.S. subsidiary and all future subsidiaries.

The petitioner provided a list of its current employees, a brief description of each employee's area of responsibility, and evidence of wages paid to employees in 2007 and 2008. The petitioner indicated that its U.S. staff includes the company's CEO, office manager, account manager/marketing and sales manager, senior software developer, and a junior software developer. The petitioner indicated that it has also hired a junior designer with a start date of May 1, 2009.

The director denied the petition on May 19, 2009, concluding that the petitioner failed to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. In denying the petition, the director observed that the petitioner's California office employs only four workers, and noted that "it appears that the beneficiary will be performing many aspects of the day-to-day operations of the business." The director noted that the beneficiary's stated responsibility for operations management, comprising 50 percent of his time, is "not justified because there are only four employees," and that his "executive role as the Chief Technology Officer does not match up to the responsibilities."

On appeal, counsel asserts that the director erred by denying the petition based almost entirely on the size of the U.S. company, and applied a standard that discriminates against small or medium-sized businesses. Counsel further contends that the director had no basis for assuming that the beneficiary would be performing the services of the company when all of the information and documentation provided indicates that his duties relate to corporate development, staff hiring, business development and related executive or senior management functions.

Counsel emphasizes that the petitioner consistently presented the beneficiary's qualifications as an executive rather than as a manager. In this regard, counsel notes that a high tech company reasonably requires the insight of an executive-level Chief Technology Officer in developing corporate strategy. In this regard, counsel asserts that the beneficiary oversees an essential function of the petitioning technology company.

With respect to the beneficiary's "operations management" responsibilities, counsel asserts that the duties listed are clearly executive in nature. Counsel contends that the director's decision contains no specific examples of non-qualifying tasks among those listed by the petitioner, but rather is based on a presumption that a company with four employees cannot support an executive-level position.

#### ***B. Discussion***

Upon review, the petitioner's assertions are persuasive. The AAO finds sufficient evidence to establish that the beneficiary will be employed in a primarily executive capacity. As noted by counsel, the director's decision appears to be based primarily on the staffing levels of the U.S. company.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in either an executive or a managerial capacity. *Id*

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. In the case of an employee who is claimed to manage or direct an essential function rather than directly supervising subordinates, these other factors may include the beneficiary's position within the organizational hierarchy, the depth of the petitioner's organizational structure, the scope of the beneficiary's authority and its impact on the petitioner's operations, the indirect supervision of employees within the scope of the function managed, and the value of the budgets, products, or services that the beneficiary manages.

Here, the AAO is persuaded that the beneficiary's responsibilities have been and will be primarily executive duties associated with directing the technology function for the petitioner's international organization. Based on the petitioner's description of the beneficiary's duties, the beneficiary is charged with establishing all goals, policies, strategies, standards and processes pertaining to information technology and communications within

the company. The scope of his discretionary authority extends from establishing internal corporate policies for several company departments, to devising strategies for management of highly valuable client projects. The record further establishes that the beneficiary has been given significant discretion in decision-making, as evidenced by his authority to negotiate joint venture and strategic partnership relationships with other companies. Importantly, the petitioner has provided specific examples of policies, processes and strategic partnerships that can be attributed to the beneficiary, and has not merely repeated the language of the statutory definition of executive capacity. The beneficiary is clearly a member of the senior executive management team and works closely with the company's president and chief executive officer in determining the direction of the business in the U.S. and abroad.

Although the director based his decision almost entirely on the size of the U.S. company and the number of staff, the director did not take into consideration the reasonable needs of the organization as a whole. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

Here, the evidence of record establishes that the U.S. petitioner works closely with its Austrian parent company and has been outsourcing most of the work associated with providing services to the foreign entity's creative, design and software development staff. Thus, the fact that the U.S. company has only two software developers on staff should not lead to a conclusion that the petitioner would require the beneficiary, as chief technology officer, to perform the day-to-day duties associated with designing and developing software solutions for the petitioner's clients. Rather, it is reasonable to believe that the petitioner will continue to outsource these functions to the foreign entity while the U.S. company's staff is being recruited and developed and as it moves towards its goal of increased self-sufficiency. Notwithstanding the small staff size of the U.S. company, the petitioner has provided evidence that its sales have steadily increased from \$789,000 in 2006 to \$1.1 million in 2007 to \$1.8 million in 2008. The petitioner has explained that the purpose of the beneficiary's transfer is to oversee the expansion of the business as it develops to match the technical capabilities of its parent company and takes advantage of new opportunities in the U.S. market. The petitioner has documented that this growth is already occurring and that it has a reasonable need for the temporary transfer of its chief technology officer in an executive capacity during this time of transition and expansion.

While the beneficiary will undoubtedly be required to apply his technical expertise in carrying out his job duties, the AAO is persuaded that the vast majority of the day-to-day non-executive tasks required to provide services to U.S. clientele are carried out by the technical, creative, business and administrative staff of the U.S. and foreign entities. The petitioner need only establish that the beneficiary will devote more than half of his time to executive duties associated with directing a major function of the organization.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has sustained that burden. Accordingly, the director's decision dated May 19, 2009 is withdrawn.

**ORDER:** The appeal is sustained.